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Supreme Court, U. S.
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No. . . . . .

IN THE

Supreme Court of the United States

October Term, 1980

DAN E. BUTCHER,

Appellant,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Appellees,

JAMES A. HENNEFER and ROBERT N. KLEIN, II,

Real Parties in Interest.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

JURISDICTIONAL STATEMENT.

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Question Presented.

Is a state statute unconstitutional which permits a plaintiff to file a lis pendens depriving a landowner of the right to deal with his own property where there is no provision for prior notice and a hearing?

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ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

JURISDICTIONAL STATEMENT.

Dan E. Butcher, the appellant, appeals from the final judgment of the Supreme Court of the State of California, dated June 18, 1980, denying his petition for a hearing to consider the decision of the Court of Appeal of the State of California, Second Appellate District, Division Three, filed on April 28, 1980 denying a petition for Writ of Mandate pursuant to California Code of Civil Procedure, Section 409. These denials upheld the validity of the California Lis Pendens Statute as against Petitioner's challenge that it is constitutionally invalid in that it provides for a taking of property without due process of law as guaranteed by the Constitution of the United States.

Opinions Below.

The Order of the Court of Appeal of the Second Appellate District, State of California, filed on May 1, 1980, is printed as Appendix A hereto.

The notification by the California Supreme Court of denial of hearing in this case, filed June 18, 1980, is printed as Appendix B hereto.

Jurisdiction.

The Court of Appeal, Second Appellate District, of the State of California denied Petitioner's application for Writ of Mandate on April 28, 1980. A timely petition for hearing was filed with the Supreme Court of the State of California, and that Court on June 18, 1980, filed its order denying the petition for hearing.

The jurisdiction of this Court is invoked under Title 28 U.S.C. section 1257(2).

Constitutional Provisions and Statutes Involved.

The Constitutional provision which the present case involves is the Fourteenth Amendment to the United States Constitution, which provides in pertinent part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

The California Statutes which petitioner claims to be constitutionally impermissible provide in pertinent part as follows:

> "In an action concerning real property or affecting title or the right of possession of real property, the plaintiff, at the time of filing of the complaint, and the defendant,

at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, and the object of the action or defense, and a description of the property in that county affected thereby."

California Code of Civil Procedure, Section 409

"At any time after notice of pendency of an action has been recorded pursuant to Section 409 or other law, the court in which the action is pending shall, upon motion of a party to the action supported by affidavit, order that the notice be expunged, unless the party filing the notice shows to the satisfaction of the court, by a preponderance of the evidence, that:

(a) The action does affect title to or right of possession of the real property described in the notice; and

(b) Insofar as the action affects title to or right of possession of the real property described in the notice, the party recording the notice has commenced or prosecuted the action for a proper purpose and in good faith . . .

The court, as a condition of granting or denying the motion to expunge, may require that the party prevailing upon such motion give the other party an undertaking of such nature, and in such amount as shall be fixed by the court, such undertaking to be to the effect that such prevailing party will indemnify the other party for all damages which he may incur if he ultimately prevails in the action."

California Code of Civil Procedure, Section 409.1.

Raising the Federal Question.

The federal question was raised at the trial court level at the earliest stage of the proceedings, appellant's motion to

expunge. In appellant's moving papers he objected to the said lis pendens on several grounds, including:

> (1) That the recordation of a lis pendens without notice and a prior opportunity to be heard by the owner of the real property so affected constitutes a taking which is violative of the Due Process Clauses of the California Constitution and the Constitution of the United States.

This Fourteenth Amendment claim was reiterated by appellant before the Court of Appeal of the State of California, when he petitioned that court for a writ of mandamus. The claim was again raised by appellant before the Supreme Court of the State of California, which Court entered its order denying a hearing in this matter.

Statement of the Case.

A. Lower State Court Proceedings:

On January 31, 1979, appellees filed in the Superior Court of the State of California a complaint entitled James A. Hennefer and Robert N. Klein, II v. Dan Butcher, etc., et al., Los Angeles Superior Court case No. C 271033, alleging causes of action for specific performance of contract for sale of land, breach of contract, declaratory relief, temporary restraining order, and preliminary and permanent injunctions. Appellant was never served with a copy of this complaint. Concurrently with the filing of this original complaint, appellees caused to be recorded a lis pendens against the real property which is the subject matter of this action. Appellant did not discover the existence of the lis pendens upon his real property until some months later when he caused a title search to be conducted upon that property. California law does not require that the property owner be informed when a lis pendens is recorded, and appellant was not so informed by appellees.

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On July 26, 1979, appellees filed in the Superior Court a First Amended Complaint in the above action, which was served on appellant on that same day. On or about January 21, 1980, appellant duly filed and served Notice of Motion to Expunge Lis Pendens, objecting to the said lis pendens on several grounds, including the federal Constitutional grounds herein stated.

On April 8, 1980, the Superior Court of the State of California entered its order denying the motion to expunge. In its order, the court failed to consider the constitutional issue raised by appellant, ruling only that the action did affect the title or right to possession of real property and that it had been commenced in good faith.

B. State Appellate Proceedings:

On April 28, 1980 petitioner filed his petition for writ of mandate before Division Three of the Court of Appeal, Second Appellate District, State of California. The Order of that court denying the petition by a two-to-one vote was filed on May 1, 1980 (Appendix A).

A petition for hearing was filed in the California Supreme Court, and on June 18, that court entered its order denying a hearing in this matter, though the Chief Justice was of the opinion that the hearing should be granted. (Appendix B).

The Question Presented Is Substantial.

The question as to whether the filing of a lis pendens without notice and an opportunity to be heard is a "taking" of property which is constitutionally impermissible one. Cases collected in 54 *Corpus Juris Secundum*, Lis Pendens, Sections 3, 22, 23, 28, 29 and 30 indicate that at least sixteen states have such a statutory provision, placing the burden on the one suffering the "taking" after the taking occurs.

Appellant has been able to determine that, in addition to California, such procedures are followed in Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Louisiana, Michigan, Minnesota, North Carolina, New Jersey, New York, Rhode Island, Texas, and Wisconsin. Appellant has been unable to discover a single instance where the constitutionality of statutes such as the one in question has been ruled upon by this Court.

Further, even in states which have no statutory provision for the filing of a lis pendens, it is a part of the common law.

> "The law of lis pendens stems back to the Roman law where the rule was 'a thing concerning which there is a controversy is prohibited during suit from being alienated.' The same rule was formulated and adopted by Lord Bacon, thereafter becoming firmly fixed in the English law, inherited by us as a part of the common law."
>
> *Massachusetts Bonding & Insurance Company v. Knox* (1942) 18 S.E.2d 436, 438; 220 N.C. 725; 138 A.L.R. 1438.

The concept of what constitutes due process of law and which rights are worthy of constitutional protection has grown with man's conception of his place in the world, and what he perc ives his rights to be. This Court has established an ever-widening area of protectible property interests, as have the courts of the various states. The California Supreme Court stated its viewpoint as regards due process in the 1971 case of *Randone v. Appellate Department* as follows:

> "An individual must be afforded notice and an opportunity for a hearing before he is deprived of any significant pr operty interest, and . . . exceptions to this principle can only be justified in 'extraordinary circumstances.' "

Randone v. Appellate Department of the Superior Court (1971) 5 Cal.3d 536, 541; 99 Cal.Rptr. 709.

What, then, is a "significant property right" which demands notice and a hearing before an individual can be deprived thereof? A brief review of some of the decisions dealing with the definition of such property rights establishes that a child placed with prospective adoptive parents cannot be removed from the home without notice and a hearing prior to removal. (*C. v. Superior Court* (1973) 29 Cal.App.3d 909, 915; 106 Cal.Rptr. 123).

Prejudgment garnishment statutes were struck down by this Court in *Sniadach v. Family Finance Corp.* (1969) 359 U.S. 337 (23 L.Ed.2d 349, 89 S.Ct. 1820). The termination of welfare benefits without a prior hearing was found violative of due process in *Goldberg v. Kelly* (1970) 397 U.S. 254 (25 L.Ed.2d 287, 90 S.Ct. 1011); the suspension of a driver's license without a prior hearing was held constitutionally impermissible in *Bell v. Burson* (1971) 402 U.S. 535 (29 L.Ed.2d 90; 91 S.Ct. 1586).

Fuentes v. Shevin (1972) 407 U.S. 67 (32 L.Ed.2d 556, 92 S.Ct. 1983) struck down statutes authorizing seizure of goods under an ex parte writ of replevin. *Goss v. Lopez* (1975) 419 U.S. 565 (95 S.Ct. 729, 42 L.Ed.2d 725) extended the due process protection of notice and right to be heard to a ten-day suspension from school.

Analyzing the ever-expanding concept of what due process has been found to be, it can clearly be seen that the present lis pendens statute in California is constitutionally impermissible. It is without question that the right to own property is a substantial right, as is the right to deal with one's real property. In the California statute, not only is there no provision for judicial participation in the initial taking, but the hearing, if any, comes about only at the

instigation of the person being deprived of his property rights. The only determination to be made at that hearing is whether the allegations of the complaint present a question of right of possession or title to real property, and that the "taking" was done for a proper purpose. The propriety of purpose of a "taking" has never been the standard by which one's right to prior notice and a hearing has been determined. The standard has been, rather, whether there has been a "taking" at all.

In determining whether the filing of a lis pendens constitutes "deprivation of a significant property interest" there are many factors to be considered. Real estate activity involving buying, selling, developing, and financing, constitutes an important part of the economic growth of the State of California and indeed of the entire country.

The recording of a lis pendens interferes with the property owner's right to deal with his own property in that, as a practical matter, he is unable to obtain financing for development, and unable to transfer the real property. The use of the right to record a lis pendens which affects marketability of title to real property has become so widespread in this state that sellers of real property are becoming more and more reluctant to enter into agreements for the transfer and financing of real property, for fear that a buyer or one who claims an interest in the real property can file a simple action for specific performance and record a lis pendens, without fear of incurring liability for damages which might result to the seller by the clouding of the title to the property.

The fact that a lis pendens may be recorded without notice and opportunity to be heard has made it a powerful tool in the hands of the unscrupulous. This is because in inflationary times, such as we are presently experiencing, it becomes an attractive gamble for one claiming an interest in another's real property, no matter how spurious the claim, to utilize

the lis pendens to tie up the property, and then be in a position to extort a favorable settlement from the landowner in order that the landowner may avoid legal expense and protracted, expensive, and time-consuming litigation before he is again in a position to deal with his own property for his own benefit. There has been a proliferation of just such actions in California. Those seeking to utilize the lis pendens statute are fully aware that it now takes an average of four years from the date of the filing of the complaint to get to the trial of the action on its merits.

At the present time, all that California law requires in order to record a lis pendens, is that an attorney, by a stroke of the pen, may record a one-page document with the attached legal description of the property in question and thereby bring into being an awesome cloud on the title of the property of another.

He need post no bond; he need not even present a prima facie case; he need not appear before any judge or magistrate; he need not sign an affidavit of good faith, and he is not otherwise risking damages to himself or to his client.

Once this document is recorded, the burden then shifts to the landowner to petition the court for a hearing. At this hearing, the only showing that need be made is that the complaint alleges causes of action that affect title to or right of possession of real property, and that the parties commencing the action are not prosecuting the same for an improper purpose. (California Code of Civil Procedure, Section 409.1)

In the event that the landowner is successful in meeting this burden, he may then be required to give an undertaking in such amount as the trial court may determine to indemnify the responding party for all damages which he might incur if the responding party should be successful in the ultimate

outcome of the case. This Court should be aware that the bond required in these circumstances is cash, or negotiable securities, which are placed on deposit with the trial court. The posting of such a bond could well be completely outside the ability of the landowner to do, even if the trial court should rule in his favor, expunging the lis pendens. The effect of this statute is that the landowner, in order to prevent one "taking", that of the beneficial use of his land, must suffer yet another, the deprivation of the use of his money pending the outcome of the litigation.

In the case before this Court, appellant's property is vacant land. He is realizing no benefits from it. He does not live upon the land, nor collect rents from the use thereof. The land is not agricultural land, and he recognizes no gains from any crops or minerals on the land. Yet appellant is forced to go on making payments, paying taxes, and incurring other expenses relative to the land though he, as a practical matter, cannot utilize it himself. He has thus lost all beneficial use of his land: an obvious interference with a substantial property right, and worthy of due process protection.

The present California statute is even more insidious in its effect, in that even if the person suffering the "taking" prevails in the hearing on the merits of the litigation, he cannot seek damages for the disparagement of title which he has suffered.

> "The recordation of a notice of lis pendens is in effect a republication of the pleadings and hence is clothed with absolute privilege in an action for disparagement of title."
>
> *Albertson v. Raboff* (1956) 46 Cal.2d 375; 205 P.2d 405.

As long ago as 1948, Justice Frankfurter, speaking for this Court, established the fact that the concept of due pro-

cess of law is one which embodies a living and growing principle:

> "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.
>
> "To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn, but to recognize that it is for the Court to draw it by the gradual and empiric process of 'inclusion and exclusion.' "
>
> *Wolf v. People of the State of Colorado* (1948) 338 U.S. 25, 27; 69 S.Ct. 1359, 1360.

Courts have consistently expanded the idea of the meaning of due process, in a series of decisions ranging from finding prejudgment attachment statutes to be unconstitutional to requiring notice and a hearing prior to suspension from school. Clearly, the trust of the law is to give the person whose rights are being abridged in any significant way at all the absolute right to notice and a hearing before those rights may be tampered with.

Appellant contends that the Legislature of the State of California, in enacting the Lis Pendens Statute, as it is presently constituted, has violated his rights and those of others similarly situated under the Fourteenth Amendment of the United States Constitution.

Conclusion.

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,
SEYMOUR I. COHEN,
PATRICIA F. CLOTHIER,
DUDLEY GRAY,
By SEYMOUR I. COHEN
Counsel of Record
Counsels for Appellant.

APPENDIX A.

Order.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Dan E. Butcher, Petitioner, v. The Superior Court of Los Angeles County, Respondent, James A. Hennefer and Robert N. Klein, II, Real Parties in Interest. 2d Civil No. 59224 (Super. Ct. No. C 271033).

Filed: May 1, 1980.

The Court:* The petition for writ of mandate, filed herein on April 28, 1980, has been read and considered. The petition is denied.

I would grant.

Cobey, J.

*Klein, P.J., and Potter, J.

APPENDIX B.

Order Denying Hearing. After Judgment by the Court of Appeal.

2d District, Division 3, Civ. No. 59224 IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK.

Butcher, Petitioner v. The Superior Court of Los Angeles County, Respondent; Hennefer et al., Real Parties in Interest.

Filed: June 18, 1980.

Petition for hearing DENIED.

Bird, C.J., is of the opinion that the petition should be granted.

Bird
Chief Justice